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Regulatory
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Proposed Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-260
Regulation title	Water Quality Standards
Action title	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating a portion of the main stem of Ragged Island Creek in Isle of Wight County as an Exceptional State Water
Document preparation date	December 16, 2003

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief Summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

The State Water Control Board (Board) is proposing an amendment to the Antidegradation Policy section (VAC 25-260-30) of the State's Water Quality Standards regulation to designate a portion of the main stem of Ragged Island Creek in Isle of Wight County for special protection as an Exceptional State Water.

Basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General

Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site

<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This proposed amendment is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

The proposed amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards, would designate a portion of the main stem of Ragged Island Creek in Isle of Wight County for special protection as an Exceptional State Water (9 VAC 25-260-30.A.3.c).

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
 - 3) other pertinent matters of interest to the regulated community, government officials, and the public.*
- If there are no disadvantages to the public or the Commonwealth, please indicate.*
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Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment.

The primary advantage to the public is that this waterbody will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance for Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). Those businesses located near the designated water, as well as the county in which the water body is located, may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that lead to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

Requirements More Restrictive Than Federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The proposed amendment does not exceed applicable federal minimum requirements.

Locality Particularly Affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

County
Isle of Wight

Public Participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and on any impacts of the regulation on farm and forestland preservation.

The Board also seeks comment on whether the eligibility decision criteria for Exceptional State Water designation is met for this water and whether the upper and lower boundary designations are appropriately delineated.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail, email or fax to Jean W. Gregory, Office of Water Quality Programs, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, (804) 698-4113, by fax to (804) 698-4522 , or email jwgregory@deq.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period.

A public hearing will be held and notice of the public hearing can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Financial impact

Please identify the anticipated financial impact of the proposed regulation and at a minimum provide the following information:

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	The projected cost to implement and enforce the proposed regulatory amendment should not cause any additional financial impact to the state. These programs are funded by EPA 106 grants.
Projected cost of the regulation on localities	It is not expected that this Exceptional State Water designation will impose a cost on the localities.
Description of the individuals, businesses or other entities likely to be affected by the regulation including specific information on the impact on small businesses as defined in § 2.2-2279	Landowners adjacent to the designated water bodies. For this rulemaking, the Department of Game and Inland Fisheries and twenty-two private landowners have been identified.
Agency's best estimate of the number of such entities that will be affected	23
Projected cost of the regulation for affected individuals, businesses, or other entities	None, unless the alternative to discharging to the designated waterbody requires some additional financial expenditure.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

In compliance with the State Water Control Board's Public Participation Guidelines (9 VAC 25-10-20 C), the Department will consider all alternatives which are considered to be less burdensome and less intrusive for achieving the essential purpose of the amendment, and any other alternatives presented during the proposed rulemaking.

The primary alternative considered to date was to leave the regulation unchanged. This was not the alternative chosen because this waterbody met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

Public comment

Please summarize all public comment received during 30-day period following the publication of the NOIRA, and provide the agency response.

The comment period for this Notice of Intended Regulatory Action ended on July 25, 2003. Below is a summary of public comments received during that comment period.

Commenter	Comment
<p>Stan D. Clark, Isle of Wight County Supervisor</p>	<p>Water Body - <u>Ragged Island Creek</u> Commented in favor of the designation by stating he hoped DEQ would act favorably and commented that Ragged Island Creek is a rare and environmentally sensitive waterway.</p>
<p>Horace A. Gray, III Vice President, GrayCo</p>	<p>Opposes the designation stating that the water body does not possess an exceptional environmental setting nor exceptional recreational opportunities and still has concerns about federal control over private property and localities' and the Commonwealth's ability to regulate the use of lands fairly and in the public interest.</p>
<p>Theresa Johnson</p>	<p>Stated at the July 11, 2003 public meeting that she is strongly in favor of the designation. Further commented that she has enjoyed living on Ragged Island Creek since 1965 and that enjoyment has been derived from the many outstanding aspects and qualities of the creek. She hopes that the water quality of the creek continues to be maintained and that the creek continues its role as a valuable nursery area.</p>
<p>Jerianne Gardner, Isle of Wight Citizens Association</p>	<p>Ms. Gardner, representing the petitioning group, commented at the July 11, 2003 public meeting in favor of the designation. She stated her group's devotion to long term protection for Ragged Island Creek and addressed GrayCo's previously submitted concerns regarding restrictions a Tier III designation would place on their ability and the Dept. Game and Inland Fisheries' ability to develop property. She stated that GrayCo will still be able to develop their properties with the drainage systems currently in place and that the DGIF does not encourage invasive structures within the DGIF owned Wildlife Management Area. Ms. Gardner also wished to remind the SWCB of the following supporters for the designation: Isle of Wight County Board of Supervisors, Del. William Barlow, Sen. Randy Forbes, Sen. Fred Quayle, James River Association, Sierra Club, Chesapeake Bay Foundation, Carrollton Civic League, Izaak Walton League, and a supporting petition signed by 464 local residents, thirteen of whom are riparian landowners on the proposed segment of waterway.</p>
<p>Richard L. Bowie, President, Terry Peterson Residential Neighborhoods</p>	<p>Wrote on behalf of Terry-Peterson Residential, which is developing several tracts of land associated with Eagle Harbor and has a storm water discharge to Ragged Island Creek. Terry-Peterson opposes the designation because they do not feel Ragged Island Creek meets any of the criteria necessary to be considered for an Exceptional Waters designation. They are concerned the designation will result in severe restrictions in their ability to develop their property. They feel the nomination was made solely as an effort to limit or stop the development of their, and surrounding properties.</p>
<p>Albert Burckard</p>	<p>Commented at the July 11, 2003 public meeting in favor of the designation and addressed the exceptional recreational opportunities in terms of the rich historic importance of the area.</p>
<p>Evelyn Chandler</p>	<p>Opposes the designation due to concerns of loss of local control over Ragged Island Creek and her perception that the nomination was made as an effort to halt development in an area that has been designated as a planned growth area for Isle of Wight County.</p>

Pat Clark	Stated at the July 11, 2003 public meeting that Virginia has already lost much of its natural wetlands and a Tier III designation would protect Ragged Island Creek in its current state. Also remarked that Christopher Newport University and the Isle of Wight public schools frequently utilize the creek, due to its convenient location, for field studies.
Charles Fredrickson, JRA	Representing the James River Association, he stated at the July 11, 2003 public meeting that the JRA strongly supports the designation and believes that Ragged Island Creek is a worthy candidate.
Nancy Guill	Stated at the July 11, 2003 public meeting that the Rescue Community League is still in support of the designation. The League emphatically believes Ragged Island Creek belongs in the category of Exceptional Waters.
Thomas Henderson	Commented at the July 11, 2003 public meeting in favor of the designation and commented that GrayCo's comments regarding an inability to develop their property should the creek gain Exceptional Waters status lack substance. Also refuted GrayCo's statement that the creek lacks an exceptional environmental setting.
Branch P. Lawson, President, Eagle Management Corp.	Wrote on behalf of Eagle Management Corp., which manages the Eagle Harbor development on the southwest shore of Ragged Island Creek. They oppose the designation because they feel that the designation could prevent further development of the site. He requests that the petition be denied. Should DEQ decide to proceed he requests that a participatory process be undertaken. He also notes that the proposed boundary description in the NOIRA does not include the petitioners' statement that "This nomination does not include wetlands or impound areas".
Carl E. Lincoln, Exec. Vice President, Peninsula Housing and Builders Association	Wrote on behalf of the Peninsula Housing and Builders Association in opposition to the designation due to concerns of the potential loss of local control over property rights and possible restriction of the locality's ability to manage property in the locality's best interests. He also comments that a Tier III designation could be disastrous for riparian properties with a multi-year, multi-phase build-out.
Joseph Maroon, Director, Dept. Conservation and Recreation	Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.
Karl Mertig	Opposes the designation due to shellfish closures and the opinion that Ragged Island Creek is not functionally, ecologically, aesthetically, or recreationally more remarkable than many other creeks and rivers of the lower James River basin. Also states that it did not appear that DEQ determined the names and addresses of riparian property owners after the Isle of Wight Citizen's Association request that their petition be reactivated and that DEQ should clarify whether or not the designation boundary will be made as requested by the petitioners.
John Olivieri, Chair, TBA	Commented on behalf of the Tidewater Builders Association (TBA) to

Municipal Affairs Committee	oppose the designation because of the substantial uncertainty it would impose on the use of riparian property and the Commonwealth's improvement of the Wildlife Management Area. Also oppose the designation because the nomination was made with the intent of making the development of their neighborhoods more difficult, the creek does not meet Tier III criteria, and the designation would be inconsistent with earlier agency antidegradation decisions.
Reginald Phillips	Spoke in general terms regarding how his religious faith supported providing protection for fish and other organisms living in the water.
Terry M. Marshall, Vice President, The Breeden Company	Opposes the designation stating that the water body does not meet the criteria necessary for designation and that such a designation would be contrary to the intent of the antidegradation policy. Also states that the arbitrary designation of Ragged Island Creek would result in the burden of federal involvement to Virginia affairs without providing any benefit and they are concerned about the effects of a Tier III designation on landowners and their rights to utilize their property.
Michael L. Toalson, HBAV	Provided comment on behalf of the Home Builders Association of Virginia (HBAV) in opposition to the designation because they object to a federal program that places local land use matters in the hands of the federal government and the likelihood of significant future impacts on the property rights of the Commonwealth and private riparian property owners. They also state that the nomination appears to be another attempt to slow or halt development within the Route 17 corridor.
Eric E. Zicht	States that he is philosophically opposed to any designation of Exceptional Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".

AGENCY RESPONSE:

Potential Restrictions on the Issuance of Storm Water Permits: Because of issues raised during the public comment period regarding the proposed boundary descriptions for Ragged Island Creek and the restrictions such a designation would place on the issuance of storm water permits, the agency implemented the participatory approach and convened a technical advisory committee to advise staff on those two issues regarding the amendment. Agency staff altered the originally proposed boundaries for the Exceptional State Water designation by truncating the boundary to the main stem of the creek and moving the upper boundary line downstream from Route 17. These changes more clearly state the petitioner's intent to not include wetlands or impounded areas and avoid storm water permitting issues along the Route 17 corridor.

Eligibility criteria: The State Water Control Board's decision to initiate the regulatory process for Ragged Island Creek was based upon staff findings made during a site visit to the creek to verify the eligibility criteria documented in the citizen petition that the water body satisfies two of the eligibility criteria (exceptional environmental setting and exceptional recreational opportunities) necessary for consideration for Exceptional State Waters status. The waterbody was not considered to possess an exceptional aquatic community. The basis for the exceptional recreational opportunities was hiking, canoeing/kayaking, fishing, hunting, birding, and photography within the Virginia Department of Game and Inland Fisheries wildlife management area.

Satisfaction of notification requirements for a new petition: In addition to the initial notification of riparian landowners in 2001, DEQ staff wrote to the Commissioner of Revenue in Isle of Wight again in 2002 and requested the names and addresses of current riparian landowners. The Isle of Wight Commissioner of the Revenue provided the names and addresses of riparian landowners and these were used in making

the state code required notifications to riparian landowners in 2002. Staff carried the correspondence and other files related to the rulemaking with them to the two public meetings so that the files would be readily accessible to the public. The commentor did not attend these meetings.

Impact on family

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters is designated under 9 VAC 25-260-30.A.3.c as an Exceptional State Water.	The addition of a portion of the main stem of Ragged Island Creek in Isle of Wight County to 9 VAC 25-260-30.A.3.c. This water body meets the eligibility criteria requirements for designation as an Exceptional State Water.

In 9 VAC 25-260-30 the following amendment is proposed:

(11) Ragged Island Creek in Isle of Wight County from its confluence with the James River at a line drawn across the creek mouth at N36°56.306'/W76°29.136' to N36°55.469'/W76°29.802' upstream to a line drawn across the main stem of the creek at N36°57.094'/W76°30.473' to N36°57.113'/W76°30.434', excluding wetlands and impounded areas and including only those tributaries completely contained within the Ragged Island Creek Wildlife Management Area on the northeastern side of the creek.